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BEFORE THE
STATE OF CALIFORNIA INTEGRATED WASTE MANAGEMENT BOARD

In the Matter of the Notice and Order Pertaining to:	**OAH No. 2008 100665**
DIXON PIT LANDFILL	**LOCAL ENFORCEMENT AGENCY BRIEF**
Guy Kalwani/ Super Pallet Recycling Corp. **Jasmall Singh/ Five Star Auto and Towing.**	**Date: November 17, 2009** **Time: 9:30 A.M.**
Appellant(s). /	

Super Pallet Recycling, the operator[1] of the closed Solid Waste facility known as the Dixon Pit Landfill has appealed to this Board pursuant to section 45030 of the Public Resources Board. Appellant appeals as to the decision of Administrative law Judge (hereinafter "ALJ") Katherine Frink dated July 24, 2009 (Hereinafter, "decision"). The decision upholds a Notice and Order issued by the Local Enforcement Agency, the Environmental Management Department of Sacramento County (hereinafter "LEA" or "EMD"). The date of the Notice and Order is September 30, 2008 (ex. F).

Hearing in this matter was conducted pursuant to the procedures established in

[1] The solid Waste Facility permit for the Dixon Pit landfill also includes a property owner, Five Star towing. Five Star is subject to the Notice and Order in this matter and did initially participate in the underlying hearing, but withdrew after the first day of hearing. Five Star is not participating in this appeal.

Public Resources Code Sections 44308 and 44310 on January 5, March 23, May 11, 12, 13, 27 and June 9, 2009. Following the hearing ALJ Frink directed the submission of written arguments by all parties. ALJ Frink issued her decision on July 24, 2009. Appellant Super Pallet filed its notice of Appeal on August 3, 2009 (Hereinafter "appellant's brief").

INTRODUCTION

At issue in this matter is landfill gas control. Specifically, migrating landfill gases have been exceeding the regulatory maximum of 5% at the perimeter of the Dixon Lit landfill boundary consistently for a period now exceeding two years. At hearing, the LEA introduced tests results showing explosive levels for eleven of the twelve months in 2007 (ex. O). The Notice and Order addressed test results showing explosive gas levels for several months in 2008 (ex. F. p. 3 – 4, and P), which appellant did not contest. During the course of the hearing ALJ Frink directed updates on landfill gas test results, which consistently continued to read at levels in excess of the regulatory maximum throughout the five months of the hearing (ex. X). The Notice and Order directs appellant to remedy this violation and complete modifications to its landfill gas plan which were approved in January of 2008 (ex. CC., p. 4).

STATUTORY STANDARDS FOR DETERMINATION AND EVIDENCE

45031. Board determinations following appeal filings

Within 30 days from the date that an appeal is filed with the board, the board may do any of the following:

(a) Determine not to hear the appeal if the appellant fails to raise substantial issues.

(b) Determine not to hear the appeal if the appellant failed to participate in the administrative hearing before the hearing panel, except that the board shall hear the appeal if the appellant shows good cause for the appellant's failure to appear.

(c) Determine to accept the appeal and to decide the matter on the basis of the record before the hearing panel, or based on written arguments submitted by the parties, or both.

(d) Determine to accept the appeal and hold a hearing, within 60 days, unless all parties stipulate to extending the hearing date.

§ 45032. Evidence; overturning enforcement actions

(a) In the board's hearing on the appeal, the evidence before the board shall consist of the record before the hearing panel or hearing officer, relevant facts as to any actions or inactions not subject to review by a hearing panel or hearing officer, the record before the local enforcement agency, written and oral arguments submitted by the parties, and any other relevant evidence that, in the judgment of the board, should be considered to effectuate and implement the policies of this division.

(b) The board may only overturn an enforcement action, and any administrative civil penalty, by a local enforcement agency if it finds, based on substantial evidence, that the action was inconsistent with this division. If the board overturns the decision of the local enforcement agency, the hearing panel, or the hearing officer, or finds that the enforcement agency has failed to act as required, the board may do both of the following:

(1) Direct that the appropriate action be taken by the local enforcement agency.

(2) If the local enforcement agency fails to act by the date specified by the board, take the appropriate action itself.

REQUEST NOT TO HEAR APPEAL

This Board may determine not to hear the appeal if the appellant fails to raise substantial issues (PRC 45031(a)). The LEA asserts the Board should not hear the appeal based as appellant failed to raise any issues on in its request for hearing at the trial level, the issues appellant raises before this Board on appeal exceed the scope of those considered by the ALJ and the issues identified by appellant, even if they had been raised at trial level, are not substantial.[2]

1. Failure to identify issues at hearing.

Public Resources Code Section 44310(a)(1) holds that "the hearing shall be initiated by the filing of a written request for a hearing with a statement of the issues".

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[2] The LEA's "Request not to Hear" is raised as a preliminary argument pursuant to PRC 45031(a). Pursuant to scheduling and procedural discussions between LEA counsel, Board counsel, CIWMB staff counsel and appellant's counsel, LEA counsel identified the issues pursuant to 45031 and announced the LEA's intent to raise these arguments. As a matter of efficiency and as a courtesy to this Board it was agreed that the LEA would include these arguments in the same document in which it responds to issues raised, with no prejudice attaching to these preliminary arguments for doing so. It is the expectation that this Board will fully consider and rule on these preliminary arguments prior to considering the full record and the issues presented for appeal. In the event the Board grants appellant a hearing, the LEA's arguments on appeal commence with the Statement of Facts.

The Notice and order served on appellants included a "Notice of Defense Form" (ex.F, P. 11)[3]. This form gives clear instructions to the operator subject to a Notice and Order requesting a hearing to "include the notice of defense and attached a written statement of issues providing the reason(s) why you believe you should not be subject to the enforcement action identified in the notice and order (ex. F, p. 11)).

The only documents submitted by either the appellant or the facility owner, were the two "Notice of Defense" forms, both signed by attorney Mark Pruner (ex. D). Ignoring both PRC 44310(a)(1) and the directions contained in the notice of defense form, Mr. Pruner did not include a statement of issues. Instead, Mr. Pruner hand wrote across the face of each document "Statement of issues: EMD cited wrong facts and law" (ex. D). No other documents were submitted.

The LEA gave great thought to not accepting the statutorily deficient request for hearing and not setting a hearing. However, acting in an abundance of caution, the LEA did set the hearing and then raised the issue of facial sufficiency of the hearing request in its statutorily required written response to issues (see PRC 44301(a)(4)) (ex. E, p. 3 – 5).

The LEA's written Response to Statement of Issues was filed and Served on October 31, 2008 in anticipation of a then scheduled hearing date of November 17, 2008 (ex. E). The actual hearing in this matter did not occur until January 5, 2009. The facial deficiency of appellant's statement of issues was clearly raised as an issue for hearing in the LEA's response and ample legal argument in support of a motion to strike was entered (ex. E, p. 3 - -5). Appellant had over two months to cure the defect before the hearing.

Amazingly, appellant made no effort to remedy the defect and identify any issues

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[3] Typically in a preliminary motion documents referenced would be attached. As this argument is filed contemporaneous with the record on appeal, the LEA will reference the documents within the record, with the understanding that those records will be deemed attachments for purposes of the preliminary argument.

until filing a "Reply to Response to Statement of Issues" on January 2, 2009 (ex. 1).[4] The extent of the reply was to assert that somehow the LEA knew of the issues on appeal based on a four line e-mail from appellant's counsel sent December 22, 2009, referencing earlier e-mails, from appellant's engineer[5], none of which were identified as statements of issues, or even as documents pertaining to the appeal. Nor would any of the documents have been timely, even if they had been submitted as statements of issues.

The LEA argued vigorously regarding the sufficiency of the statement of issues prior to the hearing, twice in writing (ex. N and T) and again orally to the ALJ (1/5/09 RT 27 – 49). To the great disappointment of the LEA the ALJ over ruled its objections and allowed the hearing to go forward (1/5/09 RT 37 - 49). The ALJ did leave open the possibility of accommodating the LEA should that need arise (1/5/09 RT 42).

a. The ALJ's actions in allowing the hearing to go forward was contrary to the policies of division 30.

The LEA presumes that the legislature of this state does not perform idle acts and that the requirement for a written statement identifying the issues at hearing is in statute for a purpose. In this statutory scheme, not only does the legislature direct that a statement identifying issues be submitted, at the time the appeal request is made, the legislature clearly intends that it be a sufficient enough statement of issues, such that the LEA can make a meaningful written response to those issues.[6] Appellant's cryptic handwritten language, written across the face of the Notice of Defense falls far short of this requirement.

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[4] The LEA respectfully requests that this board take judicial notice of a 2009 Calendar, which will reveal that January 2, 2009 was a Friday. The underlying hearing commenced January 5, 2009, the following Monday. In effect appellant filed its reply (which is not provided for in the Public Resources Code or the Informal rules of Administrative Procedure) the day prior to the hearing.

[5] The Engineer is not appellant's legal representative nor does he have standing to enter a request for hearing

[6] Public Resources Code Section 44310(a)(4)

The four words do not identify what facts the LEA has wrong, or what law appellant feels is wrong. Those words say essentially nothing. The purposes of requiring a written statement are numerous, but as specifically raised by the LEA, the requirement allows the ALJ to frame the issues for hearing and it allows the LEA to know what factual and legal issues it must prepare to address. The ALJ's decision to "figure out the issues as we went along", or to allow the LEA an opportunity to catch up in mid hearing defeats both of those purposes. Particularly as the LEA has the burden of proof in this type of hearing and must present its case first (1/5/09 RT 47 – 49). How can the LEA know how to present its case if appellant doesn't identify its contested issues?

The ALJ's decision to go forward also is contrary to a body of law which holds that a court will deny relief if it appears that a petitioner made only a perfunctory or skeleton showing of claimed error at the administrative hearing, expecting to present the case in full before the court.[7]

The LEA notes that Public Resources Code Section 44310 is this Board's governing law. The LEA strongly asserts that this Board should uphold and defend its law and require a meaningful written statement of issues to effectuate and implement the policies of this division. The LEA notes that the regulated community governed by this division is not relatively large. The LEA does however believe the regulated community is generally aware of the decisions of this Board. If this Board does not demand compliance with Section 44310(a)(1) in this instance, it should be anticipated that any future appellants will feel excused from the duty to provide a written statement of issues and will put future LEAs, panels and hearing officers at the same disadvantage the LEA experienced in this matter.

As to this particular appellant, Super Pallet has been the subject of several prior enforcement orders already, and as LEA staff testified, they are the most recalcitrant

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[7] *Tahoe Vista Concerned citizens v. County of Placer* (2000) 81 Cal.App.4th 577; *Peques v. Civil Service Comm'n* (1998) 67 Cal.App.4th 95; *Green v. Board of Dental Examiners* (1996) 47 Cal.App.4th 786.

operator in this LEA's jurisdiction (5/11/09 RT p. 166). This appellant is highly likely to re-offend, and if this Board does not take a stand now based on the deficient statement of issues, appellant will undoubtedly present such an absurd hearing request upon receiving its next Notice and Order. If this Board is to effectuate and implement the policies of Division 30, it is imperative that it uphold the requirements of Section 44310(a)(1) and decline to hold a hearing based on appellant's failure to comply with that section.

2. Appellant's issues on appeal were not raised at hearing.

It is a long standing maxim of appellate law that failure to raise an argument at the trail level waives the right to raise that argument on appeal.[8] Generally a litigant is not permitted to raise arguments in an administrative mandamus proceeding that were not presented in the first instance to the administrative agency or hearing officer. A party appearing at an administrative hearing should raise all issues that he or she will want reviewed if an adverse decision is rendered. Failure to raise those issues at the administrative hearing will generally preclude them from being raised for the first time during review.[9]

After denying the LEA's motion to strike based on the facial deficiency described above, the ALJ directed the hearing to go forward and a day's worth of testimony ensued (1/5/09 RT. 3 – 183). The ALJ did however make an effort to create compliance with section 44310 by identifying the issues raised in an e-mail from attorney Mark Pruner sent December 22, 2008 as the issues for hearing (1/5/09 RT 41- 42). The LEA continues to assert that this was not the correct action for the ALJ to take, as the mere fact that she had to take that step illustrates the fact that appellants were not in compliance with section 44310(a)(1). However, at that point the issues at hearing were framed.

After a full day of testimony, the hearing was adjourned, to be resumed on March 23, 2009. However, the hearing did not truly resume until May 11, 2009, because on

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[8] *California State Auto. Ass'n Inter-Ins. Bureau v. Antonelli* (1979) 94 Cal.App.3d 113, 122

[9] *NBS Imaging Sys. V. State Bd. Of Control* (1997) 60 Cal.App.4th 328

March 23, 2009 attorney Mark Pruner, who had been representing both Super pallet and Five Star, withdrew as counsel over a legal conflict (3/23/09 RT. 6 – 25). The matter was continued to May 11, 2009. New (separate) counsel took over representation of the owner and operator.

Prior to resuming the hearing, ALJ directed counsel for all parties to participate in a conference call to clarify the issues at hearing in a letter dated April 21, 2009 (ex. R). She included the e-mails referenced by Mr. Pruner to facilitate that discussion (ex. R). ALJ Frink identified the issues raised in e-mails as which collectively constituting the statement of issues (ex. R, p 2). Following the conference call, ALJ Frink issued a status conference order directing briefing which specifically referred back to that statement of issues (ex. S, p. 2). In her order on the issue from that briefing she again identified the issues as those identified in the attachment to the April 21, 2009 letter (ex. U, p. 5).

Thus, the issues at the hearing were those identified in the attachment to the April 21, 2009 letter (ex. R. P. 2 – 4). Those five issues are:

1. Respondent(s) contest the statement in the 11-25-08 inspection report that states "corrective measures to the gas collection system to abate the gas violations at probe 10-2 were not completed by the compliance date of 11-17-08"
2. By 11-16-08, probe 10-2 was in compliance with the 27 XCCR standard, without the two new LFG extraction wells (IGE-7 and IGE-8) being in operation
3. With the LFG collection system (pipe) remedies now fully constructed, sustained compliance is dependant on reliability and operational efficiency of the flares.
4. Both of the new extraction wells are not completed (IGE-7 was completed on 12-1-08). The new extraction wells (IGE-7 and IGE-8) were not needed, and we have recommended that they not be used at the present time (they are operational but not operating). They were

a waste of $20K.

5. Bergman's monitoring on 11-16-08 was the official weekly monitoring event and not only an informal monitoring.

Those five issues were the sole issues at the hearing. Those were the five issues, very generously, determined by the hearing officer to have been raised by appellant. Those were the only issues addressed in the hearing officer's decision (Decision, p. 2).

The issues appellant asks this Board to review address none of these.

Appellant's statement of legal basis includes:

1. Mootness and the impact of finalizing the order
2. The distinction between operational and operating
3. References to probes other than10-2
4. whether or not the timeline of immediately and continuously was reasonable and appropriate
5. Whether the terms "immediately and continuously" are contradictory, impossible and onerous
6. Whether the term "any other corrective measures" is unreasonable, vague or overly broad.
7. Whether the requirement to implement any other corrective measures was reasonable and appropriate.
8. The elements as set forth in Public Resources Code Section 45016
9. The impact of finalizing the September 30, 2008 Notice and Order.

Not one of these issues was identified by appellant as an issue at the hearing. Not one of these issues on appeal identifies new facts. They all relate back to the Notice and Order or to matters in evidence prior to the decision.

Appellant is essentially asking this Board to determine that the legislature intended approximately half of Article 1 of Chapter 3 of Part 4 of Division 30 to be an idle act. Sections 44307 through 44310 describe a complex hearing procedure in which the operator is to contest specific issues, identified by the operator, resulting in a decision. It

is the role of this Board to then review that decision. It is contrary to the policy of Division 30 for an operator to fail to identify any issues at all, or to have a hearing on a few small issues the hearing officer is able to glean from some e-mails, go to a decision on those issues, then appeal to this Board on an entirely new set of legal arguments.

Appellant did not raise any substantial legal issues at the underlying hearing. The issues appellant is presenting now were not identified issues at the hearing. Appellant is requesting this Board to review issues, that were not raised by appellant and were not truly before the hearing officer.[10] In essence appellant is asking this Board to review issues that weren't ever there. These are not substantial issues. It is requested the Board determine not to hear the appeal.

3. Even assuming the issues identified by appellant had been raised before the ALJ, the issues raised are not substantial

This Board may only overturn an LEA enforcement action if it finds by substantial evidence that the LEA has acted in a manner inconsistent with Division 30.[11] Appellant states no action on the part of the LEA which was inconsistent with Division 30.

Appellant points to a statement in ALJ Frink's decision that a core issue on appeal is whether the installation of gas wells was necessary. With all due respect to ALJ Frink, the core issue in determining if the LEA was acting consistent with Division 30 is the fact that this landfill has consistently been, and according to the face of appellant's appeal continues to be, in violation of 27 CCR 20921(a)(2) as methane levels at the landfill boundary continue to exceed 5% (Appellant's brief, p. 6). Appellant admits the violations remain ongoing.

The LEA's first and foremost duty is to enforce applicable provisions of part 4, regulations adopted under part 4 and terms and conditions of permits issued pursuant to

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[10] Notwithstanding that she may have addressed some of the arguments in the decision.

[11] Public Resources Code 45032(b)

Chapter 3.[12] The LEA acted consistent with this duty in issuing the Notice and Order. As appellant notes, the Notice and order directs appellants to comply with 27 CCR 20921. The Notice and order was issued on September 30, 2008 (ex. F), after the facility had been in violation of 27 CCR 20921 for most of the prior two years. The LEA was acting consistent with 27 CCR 20921 in issuing the Notice and Order.

Nothing in 27 CCR 20921 says it "OK" to have one perimeter probe consistently test in excess of 5% if the other probes all test below 5% (appellant's brief, p. 5 and 7). 27 CCR 20921(a)(2) says "the concentration of Methane migrating from the disposal site must not exceed 5% by volume in air at the disposal site permitted facility boundary. That means the entire boundary. That means every test probe. Thus the LEA was acting consistently with 27 CCR 20921 for not excusing appellant for having only one perimeter probe test at explosive levels. Appellant's assertion that the ALJ erred for not considering the other 29 probes is not a substantial issue.

The requirement that landfill operators keep the level of migrating methane below 5% is in regulation to protect the public health and safety and the environment (27 CCR 20921(a). the burden of controlling the landfill gas is placed on the operator (27 CCR 20921(b). Regulation 27 CCR 20921 does not direct the operator to control the explosive gas levels when it is convenient or reasonable for the operator to do so. It is an immediate requirement. In fact, pursuant to 27 CCR 20937, it is an emergency situation any time methane levels do exceed 5% at the perimeter boundary, which compels the operator to immediately take all steps necessary to protect the public. Thus the LEA was acting constituent with Division 30 in including direction to appellant to immediately and continuously control the methane gas levels and to implement any other corrective measures in order to protect the health and safety of the public and the environment. Again, appellant is not asserting any substantial issue.

The one thing appellant does not place on the face of its appeal is the fact that the

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[12] Public Resources Code, section 43209(a)

two new extraction wells (IGE-7 and IGE-8) were appellant's idea. The methane levels at probe 10-2 were in excess of 5% for every month of 2007, with the exception of April (ex. O). The LEA attempted a meeting with the owner and operator in September of 2007, which they refused. Instead, appellant's engineer authored a letter to the LEA[13] saying that appellants would install two new extraction wells (ex. J, p. 7-9). These wells were to have been installed within 30 days of agency approval (ex. J, p. 9). Appellant's engineer continued the promise of the two new wells on October 25, 2007 (ex. J, p. 11). Finally, plans for the well were submitted on December 28, 2007 (ex. J, p.12) These plans were approved by the LEA and CIWMB and became part of the facility's landfill gas extraction plan in January 2008 (ex. CC).

Installation of the wells became part of the terms and conditions of the landfill facility permit. Pursuant to Public Resources Code 43209(a) it became the LEA's duty to enforce those terms and conditions. Despite promises from appellant's engineer that the wells would be installed within 30 days of approval and the engineer's request to expedite that approval, so installation could occur (ex. J, p. 9), the wells were not installed as of September 30, 2008, a passage of eight months. The LEA issued a Notice and order which directed installation of the wells as called for in the post closure maintenance plan. The LEA was acting consistently with Division 30 in doing so.

This Board may only overturn an LEA enforcement action if it finds by substantial evidence that the LEA's action was inconsistent with Division 30. Nothing in appellant's request for appeal identifies any instance wherein the LEA acted in any manner other than consistent with Division 30. Appellant has not stated any facts on which relief can be granted. Appellant has in effect not raised any substantial issues. It is requested that the Board determine not to hear the appeal.

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[13] Testimony of Jeffrey Bergman, appellant's engineer, revealed that he had authored the letters in exhibit J, which he then had the facility's property owner, Jasmail Singh, sign (5/12/09 RT p. 184 - 186).

STATEMENT OF FACTS[14]

1. Chronological summary

It is standard practice for the LEA to prepare a facility chronology for use by the hearing officer in any enforcement hearing. Such a chronology was provided to the hearing officer in this matter as exhibit G. The chronology was prepared by LEA staff person Sharon Zimmerman, who testified as to its preparation (1/5/09 RT p. 56 -58) . It covers the time period from October 2004 through December 31, 2008, the week before the hearing began. The information contained in the chronology is highly relevant to the determination made at hearing. It references several past Notice and Orders, including penalty orders, which are part of the record of the LEA and are also records of this Board, of which this Board may take judicial Notice. The chronology also describes the results of several years of past inspections, including every inspection since well 10-2 was installed in December of 2006. These too are records of the LEA. Several of the entries in the chronology reference documents that are otherwise in the record in their entirety, such as the inspection reports for the facility from November 2007 until November 2008 (see ex. H).

The chronology is provided by the LEA to the ALJ at hearing as an assistive device to give a summary of the history of the facility. It also makes for an excellent statement of relevant facts, which can assist this Board in this review. Midway through the hearing ALJ Frink declined to accept exhibit G as evidence (5/13/09 Rt p. 136 – 140 and 152). The stated reason for this was the fact that it contains summaries of phone calls between LEA staff and identified agents and employees of appellants. The ALJ deemed these to be hearsay. There were four such entries out of a total of approximately 72 in the chrono. Despite the fact that hearsay is admissible the ALJ struck the chronological

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[14] As stated previously, every discussion up to this point is in support of the LEA's position that this Board should not grant appellant a hearing based on failure to raise substantial issues. Assuming the Board does grant a hearing, the LEA's response on appeal begins at this point.

summary in its entirety and refused to sever the four phone call entries from the other entries that all reference inspection reports or orders.

This Board must accept the record from the hearing officer, which includes exhibit G, even if not considerred. The LEA believes that the Board can also accept relevant facts that were not subject to review by the hearing officer, the chronological summary of the facility is certainly relevant. The Board can accept any record before the LEA. The Chrono is an LEA record and also summarizes LEA records. The Board can take judicial notice of its own records, which are referenced in the chronological summary, and the Board can accept any other relevant evidence that in its judgment should be considered in order to effectuate and implement the policies of Division 30. The chronological summary will certainly assist the Board in that regard.

The LEA asserts that the hearing officer erred in rejecting exhibit G. The LEA asks this Board to make a finding of error in that regard and consider exhibit G. In the alternative, the LEA asks the Board to accept exhibit G as a new submission, as it will assist this Board. Failing that, the LEA hereby incorporates exhibit G, solely in the form of argument and hereby incorporates it into this statement of facts. This will greatly shorten the need for a statement of facts within this brief.

2. Statement of facts

The Dixon Pit landfill is a closed Solid Waste facility. It ceased accepting waste in 1999 and began closure activities in 2001. As of a Notice and order issued May 15, 2006 it still had not completed closure (Ex. Z). Included in that order was action to be taken 1.1, which directed appellant to submit a draft amendment to its landfill gas monitoring program that specified the standards for landfill gas monitoring per attachment 2 (Ex. Z, p. 4). Attachment 2 was the landfill gas screening monitoring procedures taken from this Board's website (ex. Z, p. 8 – 21).

Appellant was not in compliance with the Notice and Order of May 15, 2006 as of January 18, 2007, resulting in a penalty order being issued (Ex. AA). That penalty order ultimately resulted in a settlement agreement dated May 3, 2007 (ex. BB). The penalty

order reflect a finding that perimeter probe 10-2[15] was in violation of 27 CCR 20921 on December 4, 2006, when it tested at 9.7% by volume. That marked the first date on which probe 10-2 tested as non compliant. It should be noted that well 10 was not installed until October of 2006 (5/12/09 RT 200 - 202)[16]. As this Board will see it has been out of compliance with 27 CCR 20921 ever since it was installed.

The easiest way for the Board to note the lack of compliance of probe 10-2 is to look at exhibits O and P. These are graphs, prepared by LEA staff, that show the test results for each of the monthly LEA tests conducted at probe 10-2. The precise date of the inspections, from which the data was taken, is shown in the upper right or on attached sheets. As the Board can see, probe 10-2 was out of compliance for every month of 2007, with the exception of April, when it dropped to 0.0%, probably an anomaly (ex. O). In 2008 probe 10-2 was compliant for the months of February, March and April, but with the onset of warm weather, exceeded 5% for every month between May and November (ex. P). These same results are shown in exhibit G (pages 4 – 8). The 2008 results are also documented in the Notice and Order (ex. F, p. 3 – 4) and the corresponding LEA inspection reports were also considered by the ALJ (ex. H).

Also, appellant was doing its own self monitoring weekly, which reflected excessive landfill gas levels for 13 straight weeks between July 10 and September 26, 2008 (ex. F, p. 4). Appellant's self monitoring reports for the period between March and December 2008 were considered by the ALJ in exhibit I. The Notice and order directing appellant to correct these violations was issued on September 30, 2008 (ex. F). That Notice and Order was the subject of the underlying action on which this appeal is based.

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[15] The number 10 refers to the well, which is perimeter test well 10. The number 2 refers to the depth of the probe in well 10. Probe 10-1 is shallow, 10-2 is medium depth and 10-3 is deep.

[16] Mr. Bergman's recollection of the exact date of the installation of well 10 was not certain during testimony, however, in a letter authored by Mr. Bergman on October 25, 2007 he identifies the installation date of well 10 as October 2006 (ex. J, p. 10)

The LEA was not idle in attempting to get appellant to bring probe 10-2 into compliance. The LEA requested a meeting with appellant, the owner and the engineer in an e-mail dated September 13, 2007 (ex. J, p. 5 – 6). Appellant and the owner rejected any meeting, and instead promised to devise an engineered plan, which included the installation of two new landfill gas extraction wells (ex. J, p. 7 – 9)[17]. Mr. Bergman went so far as to promise the installation of the two new wells within 30 days of agency approval and asked that approval be expedited (ex. J, p. 9).

A month later, in a letter dated October 25, 2007, Mr. Bergman back pedaled. Instead of going forward with the new wells, he indicated that appellant would be working on completing corrections to the LFG collection piping. These efforts included leveling and aligning the pipe and bedding a pipe with topsoil where it was sagging. Generally these were described as "adjustments to the tuning" of the LFG extraction well field (ex. J, p. 10 – 11). The LEA asks the Board to take note of these plans, they will sound familiar later. Mr. Bergman did promise that if these "tunes to the pipes" didn't work, he would move on to installation of the two new wells (ex. J. p- 11).

Finally, on December 28, 2007, Mr. Bergman transmitted the plans for the two new wells, which had been promised in September (ex. J, p. 12 and ex. CC). These were expeditiously approved by both the LEA and CIWMB, as Bergman had requested. Appellant never went forward with that installation.

Instead, appellant did nothing, and the facility went out compliance for approximately the last two thirds of 2008 (ex. H and P). Probe 10-2 tested in excess of 5% by volume in air consistently between May and September 2008. Appellants did not do or say anything about it. Actually probe 10-2 was probably out of compliance in April of 2008. There were some "shinanigans" with the testing in April and May of 2008. Appellants were supposed to be self testing weekly during this time, but failed to submit

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[17] During his testimony, appellant's longtime engineer, B.J. Bergman admitted to writing each of the letters included in exhibit J and having the owner, Jasmail Singh, sign them (RT)

test results for April 18 and 25 (ex. H – 32). When the LEA returned to test on May 1, 2008, the valve at probe 10-2 was mysteriously left open, preventing testing. The April 18 and 25 tests were still not submitted (ex. H. p. 29).

The LEA returned on May 8, 2008, and was able to test probe 10-2, which resulted in a reading of 5.5%, which is in violation of 27 CCR 20921 (ex. H, p. 27). The LEA returned for a focused inspection on May 14, 2008 (ex. H, p. 24) The LEA's results came back as with regulatory limits, but it was determined that appellant's staff had tested only an hour earlier. CIWMB engineer Gino Yekta testified that methane levels will reduce over time if the probe is allowed to vent (6/9/09 RT p. 30). Thus the LEA result on that date was likely tainted by appellant's employee's actions.

On June 19, 2008, the LEA test of probe 10-2 revealed a level of 5.8%. Appellant had failed to submit tests for the prior week ex. H, p. 22 – 23). It was also determined that appellant was using an inappropriate testing device. Appellant had been directed to use a GEM 2000, which is the appropriate device for testing in a subsurface environment. Appellant had begun using a gas tech device, which does not accurately read sub surface levels. The LEA included a directive that appellant use only the GEM on the June 18 inspection report (ex. H, p. 22 – 23). The LEA included that same order on the September 30, 2008 Notice and Order (ex. F, p. 6). Appellant is not challenging that order in this appeal.

Appellant did not challenge any of the findings of violation of 27 CCR 20921 reported in the September 30, 2008 Notice and Order. Those finding were accordingly found to be true. The ALJ did however request updated information regarding the methane level readings throughout the course of the hearing. These are best summarized in exhibit X. As the Board can see, the test results remained consistently in violation throughout October, November and December of 2008 and regularly exceeded 5% during January, February and March of 2009 (ex. X). Appellant managed to keep the levels under 5% for all of April 2009, but on the last day of the hearing, the LEA submitted its May inspection report, which showed that, once again, the methane levels at probe 10-2

exceeded 5%, with a level of 6.1% on March 26, 2009 (ex. DD, p. 1).

As stated above, after probe 10-2 had been in violation for almost a year, appellants told the LEA they would be installing two new extraction wells. They submitted plans and got expedited approval for the wells as of January 2008. Unfortunately they never installed the wells. Probe 10-2 remained in violation for another nine months. Apparently at some point in time during that nine months appellant's engineer decided that the wells were no the way to go. Unfortunately, appellant never said a word about that decision until the Notice and Order was issued.

It wasn't until a November 16, 2008 e-mail that appellant's engineer informed the LEA that "The solution had changed". Instead the engineer decided that the remedy was system pipe remedies. Once again appellant's engineer felt that all that was needed was to "tune the pipes". At this point the engineer called the well installation a waste of $20K (ex. R, p. 3). By this point one of the wells had been installed and the other would be installed by December 1, 2008. This was also the first point in which appellant began saying "the wells are operational, but they will not be operating". The wells have been installed since December 1, 2008, but appellant still refuses to operate them.

Overall, the record from the period from September 30, 2008 until the conclusion of the hearing shows appellant's steadfast insistence that all that was needed was "tuning of the pipes". Appellant described minor repairs to the pipes and system throughout the hearing (see 5/12/09 RT generally). Meanwhile, the tests results at probe 10-2 remained in violation of probe 10-2 throughout the duration of the hearing (ex. X), up until the last day of the hearing. As the LEA noted in its post hearing brief, the system designed by appellant's engineer has never worked to keep probe 10-2 in compliance (ex. FF, p. 3 – 4). The well was installed in October 2006 (ex. J, p. 10). It first tested in violation of 27 CCR 20921 on December 4, 2006 (ex. AA, p. 3). It remained in violation for 11 of the twelve monthly LEA tests of 2007 (ex. O). It was in violation for eight of the first ten months of 2008 (ex. P). It remained in violation from the date the N&O was issued until the last day of the hearing (ex. X and DD). As the LEA asserted, "tuning the pipes" is not

going to do it.

ARGUMENT

The LEA has previously noted the Standard on appeal described in Public Resources Section 45032(b)

> The board may only overturn an enforcement action, and any administrative civil penalty, by a local enforcement agency if it finds, based on substantial evidence, that the action was inconsistent with this division.

It is the LEA's fondest hope that the Board has not read this far and instead determined not to hold a hearing as requested above. In the event the Board is reviewing this matter on appeal it is requested that the Board adopt and apply all of the previous arguments entered by the LEA in requesting the Board not to hear the appeal, particularly those as to the consistency of the LEA's action with implementing and effectuating the policies of Division 30, and incorporate them here. Those arguments have the same application in the event of an appeal.

The LEA was acting entirely consistent with effectuating and implementing the policies of Division 30 and the regulations adopted pursuant to that division. 27 CCR 20921 states that Landfill gas (specifically Methane) must not exceed 5% at the perimeter at any time.

Pursuant to 27 CCR 20919 (in pertinent part) the site operator shall cause the site to be monitored for presence and movement of landfill gas, and shall take necessary action to control such gas.

27 CCR 20920 sets forth the performance standards and minimum requirements for landfill gas monitoring and control, said standards are set out in 27 CCR 20921 through 20939.

Pursuant to 27 CCR 20921(a) to provide for the protection of public health and safety and the environment the operator shall ensure that landfill gas generated at a disposal site is controlled in such a manner as to satisfy the following requirements:

(2) the concentration of methane gas migrating from the disposal site must not exceed 5 percent by volume in air at the disposal site permitted facility boundary.

Almost is not enough.

The language of these regulations, specifically established to protect pubic health and safety, is very clear. The gas migrating from the disposal site boundary cannot exceed 5%. There are no exceptions. There are no excuses. There is no extra credit for having 29 probes in compliance when one constantly exceeds 5% (appellant's legal issue 3, appellant's brief, p. 7).

Quite clearly the path the methane has chosen to migrate goes straight to test well 10 at medium depth. In order to protect the health and safety of the public and the environment, this spot, more than any other requires appellant to take the steps necessary to maintain the methane levels at a safe level. Quite clearly, appellant's landfill gas control system, as designed does not do the job and no amount of "tuning the pipes is going to change that.

"Operational" versus "Operating"

Appellant raise the absurd semantic argument of "operational versus operating" (appellant's legal arguments 1 and 2, Appellant's brief p. 6 and 7). This is the solid waste equivalent of the "it all depends on what your definition of "is", is" argument. Appellant is a professional businessman, represented by a respected attorney, but on this issue they have turned into Vinnie Barbarino.

Appellants are clearly taking a defiant "you can make us install it, but we refuse to run it" position. To re-iterate, the two extraction wells (IGE-7 and IGE-8) were the brainchild on appellant's engineer (ex. J, p. 7 – 9). Appellant's attorney submitted plans for the extraction wells. Inherent in the idea of submitting a plan for the wells is the expectation that one will use them. The extraction wells became part of the landfill gas control plan (ex. CC, p 2). Gino Yekta testified that the wells would assist the landfill gas control system in reducing the methane levels at probe 10-2 (6/9/09 RT p. 93 and 94). Mr. Yekta also testified as to alternative methods appellant could employ to keep its flare

running after wells IGE-7 and IGE-8 were brought on line[18]. The methane levels at probe 10-2 remained at explosive levels throughout December 2008 to May 2009 (ex. X and DD) and appellant refused to turn them.

The LEA is acting entirely consistently with Division 30 in both requiring appellant to keep the methane levels at its facility boundary with regulatory limits and in requiring appellant to comply with its own plans contained in the landfill gas control plan.

The LEA issued the order correctly

Any issues concerning "finalizing the order" (appellant's legal arguments 1 and 9) were not before the ALJ and were not raised at hearing. Therefore the LEA's earlier argument regarding issue preclusion prevent appellant from raising those issues now. They are in fact nonsense issues. The LEA frankly doesn't know what appellant means.

To re-iterate: this facility has been out of compliance for almost three years. Probe 10-2 has tested in violation of 27 CCR 20921 since the well was installed. When the LEA issued the Notice and Order on September 30, 2008 probe 10-2 had been out of compliance continuously for the prior five months (ex. F, p. 3 and 4). When the hearing concluded, probe 10-2 had been out of compliance consistently since the issuance of the Notice and Order, up to and including the day on which the hearing ended (ex. X and DD). The impact of finalizing the order on either date would be (and is) that appellant will have an enforcement order directing compliance with 27 CCR 20921. That will be the same impact when this Board denies the appeal.

Application of 46016

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[18] Appellant consistently blamed its violations of 27 CCR 20921 on its "flare going out" and stated it couldn't operate wells IGE-7 and IGE-8 because they would reduce methane levels at the flare. The LEA responds that it is not appellant's legal duty to keep its flare lit. It is appellant's responsibility to keep methane levels below 5% at the perimeter. Testimony revealed there are supplemental methods by which the flare could be kept lit if the methane levels got too low (6/9/09 RT 34 – 36)

Waiver

In applying the standard of 45032(b), the LEA was acting consistently in "finalizing" the order.

The factors described in Public Resources 45016 are not those applicable on appeal. As stated, the applicable factor on appeal is whether the LEA's actions were consistent with Division 30. The 45016 factors are those to be applied at hearing. Appellant in this matter in fact waived any argument as to the application of those factors at hearing by failing to raise the Section 45016 argument. There is in fact no issue for this Board to review. Therefore, the LEA asks this Board to deny consideration of this issue.

Application of PRC 45016 factors

If the Board does decide to review application of Section 45016 to this case, the LEA would argue as follows:

As to section 45016(a), the nature, circumstances, gravity of the violations or any conditions giving rise to the violations and the various remedies and penalties that are appropriate in the given circumstances, with primary emphasis on protecting the public.

Compliance with 27 CCR 20921 is specifically required in order to protect the health and Safety of the public and the environment. Thus, every time appellant violated 27 CCR 20921 the health of the public was at risk. The circumstances were that the violations persisted for over two years, during which time appellant did nothing to cure it.

As to Section 45016(b) whether the violations or conditions have been corrected in a timely fashion or reasonable progress is being made:

As has been stated, probe 10-2 has been in violation since it was installed in October 2006. The problem still hasn't been corrected. The circumstances are exactly the same as they have been for three years.

As to section 45016(c) whether the violations give rise to a chronic pattern of non-compliance with the division:

ALJ Frink did not accept exhibit G, which documents appellant's longstanding problems with compliance with Division 30. The LEA has asked this Board to consider

exhibit G on other grounds, and as appellant has now opened the door by raising section 45016 in this appeal, the LEA will further request consideration of exhibit G on this issue.

Appellant has a dismal history of non-compliance with Division 30. It took appellant over five years to close. Exhibit G documents four Notice and Orders having been issued in four years, relating to landfill gas control alone. There were three penalty orders and a myriad of inspection reports documenting violations of regulations.

As to section 45016(d) whether the violations were intentional:

Appellant intentionally refused to meet with the LEA to address landfill gas control problems in September 2007. Appellant intentionally submitted plans for the two new wells, which became part of the landfill gas control plan in January 2008 (ex. CC). Appellant intentionally refused to install the wells until ordered to do so. Appellant has intentionally refused to operate the two new wells since they were installed.

As to section 45016(e) whether the violations or conditions giving rise to the violations were voluntarily and promptly reported:

This actually became a great area of concern for the LEA (see FF, P. 18 – 21). 27 CCR 20937 directs immediate reporting to the LEA of any reading in excess of the levels prescribed in 27 CCR 20921, as well as immediate steps that must be taken to protect public health and safety. The circumstances at the Dixon Pit landfill are such that it has become clear to the LEA that its operator views excessive levels as an everyday occurrence, not requiring reporting. Appellant has in fact become accepting of its non-compliance. Reporting has been non-existent.

As to Section 45016(f), whether the violations were due to circumstances beyond the operator's control:

Appellant's engineer designed this system. It has never worked right. Appellant has the ability (and the duty) to modify the system in order to bring it into compliance with 27 CR 20921. Appellant very clearly had the ability to install the two new wells, once the LEA compelled the installation. Appellant complained about its flare going out

as creating its repeated violations, and also as an obstacle to using the two new wells. But Mr. Yekta testified as to other methods that could be used to keep the flare, and the two new wells going. This was clearly not beyond appellant's control. It was beyond his willingness, but not his control.

As to section 45016(g), whether the operator has established programs committed to one or more programs to remedy the violation:

This factor is non-existent. Appellant hasn't changed a thing, other than to tighten a few connections on its system, which has never been shown to work right in the first place.

Applying the factors of Section 45016 weighs heavily against appellant.

The wording of the Notice and order is Appropriate.

Lastly, appellant complains about the use of the terms immediately and continuously and take all necessary steps, as either unreasonable or vague and overbroad (appellant's legal issues 4,5, 6 and 7, appellant's brief, p. 7 and 8). As with all of appellant's other legal issues on appeal, appellant failed to raise these issues before the ALJ. Thus, the Board should deny consideration of this issue. In the event the Board does consider this argument, the LEA asserts it was acting consistently with Division 30 in issuing these orders.

The language immediately and continuously was applied to two requirements. The first was to control the methane gas concentration so as not to exceed 5% (ex. F, p. 5). There is nothing contrary to section 45011 in ordering immediate and continuous compliance with this requirement. There is no reasonableness requirement in section 45011. What section 45011 does say is that the LEA may issue an order establishing a time schedule according to which the facility or site shall be brought into compliance. The key issue is compliance with Division 30, and in this instance, regulation 27 CCR 20921, which is a regulation established pursuant to Division 30, provides that landfill gas exceeding 5% is a threat to public health and Safety, in which case a finding of a requirement of immediate action is justified (see PRC 44305(b)). Further 27 CCR

20937(a)(1) directs the operator to take immediate action to protect the public health and safety. Thus an immediate order was authorized to implement and effectuate the policies of Division 30 and was an appropriate order to bring the facility within compliance with Division 30.

The second immediate requirement involved testing requirements. In particular, the LEA directed appellant to use the GEM 2000, to have receipts documenting any repair of the GEM 2000 to the LEA within 5 days (not immediately), to use a specified backup or rent a new GEM 2000 only in the event the GEM 2000 was being repaired (only a contingency) and to submit weekly reports to the LEA, which was already occurring (ex. F, p. 5 – 6). Assuming section 45011 included a reasonableness requirement, which it does not, there is nothing unreasonable in including orders, which were already part of appellant's day to day operations. Further, as to GEM 2000 usage, this was already part of appellant's landfill gas monitoring plan (EX. K, P. 23), and was a justified order considering the questionable circumstances surrounding appellant's testing in June of 2008 (EX. H, P. 22 – 23).

Nor was the order to implement any other corrective measures to the gas collection system by November 17, 2008 unreasonable, inappropriate, vague or overbroad. The order gave appellant the same time period to comply with this requirement as it did to complete installation of the wells, a period of six weeks from the Notice and Order. This was ample time to complete any needed repairs, which according to appellant was all that was required.

27 CCR Sections 20921, 20923 place the burden squarely on the operator to devise a landfill gas control system that controls migrating gas levels below the limits established in 27 CCR 20921. Provided the system comply with sections 20921 through 20939, title 27 allows for the operator's discretion in determining the type of system and the method of operation. There is nothing inconsistent with Division 30 in an order that directs appellant to implement control measures that would be authorized within title 27. The order is not vague, its not unreasonable, its not overbroad. Basically the LEA is

telling appellant, yet again, to comply with his obligation to protect the public health and safety and to keep the methane gas migrating off his landfill at levels which are within regulatory limits.

CONCLUSION

In the event this Board does grant an appeal hearing and review this record, it is recommended that the Board review the post hearing brief submitted by the LEA after the hearing, as it addresses and summarizes some of these same issues. To sum up, the issue before the Board is consistency of the LEA's actions with Division 30 and whether those actions effectuate and implement the policies of that division. As the Board can clearly see, those actions were consistent. This is an operator with a long history of failure to comply with Division 30, who has been out of compliance at a perimeter probe for over two years. The LEA's action was to implement and enforce a regulation that held that appellant's lack of compliance presented an immediate risk of harm to the health of the public. That action is consistent with Division 30. The LEA asks that this Board uphold that action.

Dated: 10-26-09

Respectfully submitted,

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By _____
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